NO. 16-111

IN THE
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.; AND JACK C. PHILLIPS,

PETITIONERS,

v.

COLORADO CIVIL RIGHTS COMMISSION;
CHARLIE CRAIG; AND DAVID MULLINS,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

BRIEF OF *AMICI CURIAE* UTAH REPUBLICAN STATE SENATORS IN SUPPORT OF PETITIONERS AND REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

Amici are Utah Republican State Senators who support compromise between LGBT protections and religious liberties. In 2015, against then prevailing political currents, supermajorities in Utah's GOP controlled legislature added sexual orientation and gender identity to state antidiscrimination laws after stakeholders carefully balanced LGBT safeguards with religious liberties. This "Utah Compromise" brought together LGBT organizations and faith groups with the mutual goal of achieving fairness for all in state employment and housing laws.

As firsthand witnesses to the virtues of compromise, *amici* attest that antidiscrimination measures and the rights of free speech, association, and religion need not be fought as a zero-sum conflict with political winners and losers. Critical to Utah's success was the recognition that people of faith and LGBT people both have understandable concerns about how they are treated in the public square and that mutual accommodation can alleviate these concerns and deescalate tensions.[2]

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[1] *Amici curiae* are listed in their entirety in Appendix A. As required by Rule 37 of the Rules of this Court, *amici curiae* obtained consent of counsel of record for all parties to file this brief. *Amici curiae* also represent that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] *See* J. Stuart Adams, *Fairness for All in a Post*-Obergefell *World: The Utah Compromise Model*, 2016 U. Ill. L. Rev. 1651.

Notwithstanding the recent breakthrough in housing and employment, Utah has not achieved a similar compromise in public accommodations. Over the last eight years, no state has added sexual orientation to its public accommodations laws, dating back to 2009 when a New Mexico trial court first penalized photographer Elaine Huguenin for declining to render her services in celebration of a same-sex commitment ceremony. *Amici* believe that without assurances the First Amendment protects the conscientious objections of wedding professionals like Petitioners, the current political impasse will only further widen. While various States will continue to address the issue differently, ongoing efforts to extend LGBT protections in Republican-controlled states may continue to be stymied so long as the livelihoods of wedding professionals are in jeopardy for declining to render their services in celebration of same-sex marriage.

SUMMARY OF THE ARGUMENT

This brief argues that a decision in favor of Petitioners can be a win-win for LGBT protections and religious liberties. Presently, twenty-nine states lack protections for LGBT people "against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." Romer v. Evans, 517 U.S. 620, 631 (1996). Should this Court recognize that Petitioners have a First Amendment right not to celebrate same-sex weddings, however, these twenty-nine states may be more amenable to adding sexual orientation as a protected category to antidiscrimination statutes.

We first observe in Section I that, after a steady trend of expanding antidiscrimination legislation over three decades, in the present decade *no state* has acted to extend its public accommodations laws to include the category of sexual orientation. As one explanation, we offer that state lawmakers fear the repercussions from these laws in the absence of First Amendment protection for conscientious objectors to same-sex marriage.

Section II describes how the current political standoff creates polarized extremes. In Democratic-controlled "blue" states, wedding professionals who object to same-sex marriage, like Petitioners, are increasingly caught between a rock and a hard place, forced to choose between the potential loss of their livelihoods and the suppression of their religious views. And in Republican-controlled "red" states, the lack of protections for LGBT in places of public accommodation leave them exposed to potential abuses most Americans would find deplorable.

Section III examines public opinion polling and reveals that, although state laws reflect an extreme divide, a majority of Americans have identified a reasonable compromise. While most Americans oppose allowing a business to deny service to LGBT *people*, a majority also agree that a wedding-related professional should be able to decline, as a matter of conscience, servicing same-sex *weddings*.

Section IV argues that recognizing the First Amendment rights of conscientious objectors like Petitioners would help end the political stalemate over public accommodations. When assured that

conscientious objectors like Petitioners would not be punished for declining to service same-sex weddings, conservative lawmakers may be amenable to adding sexual orientation to antidiscrimination laws.

ARGUMENT

I. In the Present Decade, No State Has Acted To Extend Public Accommodations Laws to Include Sexual Orientation; One Explanation Is that Legislatures Fear the Repercussions Conscientious Objectors Face in the Absence of Protection under the First Amendment.

Over a three-decade period, from 1977 to 2009, twenty-one states and the District of Columbia enacted legislation adding sexual orientation to the protected categories in their public accommodations antidiscrimination statutes.[3] In the midst of this

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[3] *See* 2005 Cal. Stat. 3513, 3514 *accord* Cal. Civil Code § 51(b); 2008 Colo. Sess. Laws 1593, 1596 *accord* Colo. Rev. Stat. § 24-34-601; 1991 Conn. Acts 118, 119 *accord* Conn. Gen. Stat. § 46a-81d (Reg. Sess.); 77 Del. Laws 264, 264–65 (2009) *accord* Del. Code Ann. tit. 6 § 4502(16); 24 D.C. Reg. 6038 (Dec. 13, 1977) *accord* D.C. Code § 2-1402.31; 2006 Haw. Sess. Laws 214, 214–15 *accord* Haw. Rev. Stat. § 489-3; 2004 Ill. Laws 4837, 4838 *accord* 775 Ill. Comp. Stat. 5-5/1-103(Q), 5-5/102(A); 191 Iowa Acts 625, 625–27 *accord* Iowa Code § 216.7; 2005 Me. Laws 70, 74–75 *accord* Me. Stat. tit. 5 ¶ 42; 2009 Md. Laws 540, 554 *accord* Md. Code Ann., State Gov't § 20-304; 1989 Mass. Acts 796, 802; 1989 Mass. Acts 516 *accord* Mass. Gen. Laws ch. 272 § 98; 1993 Minn. Laws 121, 125 *accord* Minn. Stat. § 363A.11; 2009 Nev. Stat. 716, 717 *accord* Nev. Rev. Stat. § 651.070; 1997 N.H. Laws 88, 93 *accord* N.H. Rev. Stat. § 354-A:17; 1991 N.J. Laws 2708, 2709–10 (enacted in 1992); *accord* N.J. Stat. Ann. § 10:5-4; 2002 N.Y. Laws 46, 48 *accord* N.Y.

expansion of antidiscrimination laws, this Court described Colorado's local public accommodations ordinances as typifying "this emerging tradition of statutory protection," expressly noting the expansive "breadth" of entities newly "deemed [to be] places of 'public accommodation,'" a list which went "well beyond the entities covered by the common law." Romer v. Evans, 517 U.S. 620, 628 (1996). In the decade after *Romer*, more and more states followed this growing trend, adding sexual orientation to the list of enumerated categories and expanding the scope of businesses subject to public accommodations laws. By 2009, roughly half of LGBT adults in the U.S. lived in states that prohibited discrimination on the basis of sexual orientation in places of public accommodation.[4]

But during the present decade, no state has passed similar legislation,[5] despite well-documented reversals in public attitudes on LGBT issues, such as

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Exec. Law §§ 291, 296(2); 1995 R.I. Pub. Laws 82, 104 *accord* R.I. Gen. Laws Ann. § 11-24-2; 2007 Or. Laws 431, 433 *accord* Ore. Rev. Stat. § 659A.403; 1992 Vt. Acts & Resolves 26, 28 *accord* Vt. Stat. Ann. tit. 9, § 4502(a); 2006 Wash. Sess. Laws 12, 20–21 *accord* Wash. Rev. Code § 49.60.215; 1981 Wis. Sess. Laws 901, 907 *accord* Wis. Stat. § 106.52.

[4] *See* Christy Mallory & Brad Sears, *Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008–2014*, Williams Inst. (Feb. 2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Accommodations-Discrimination-Complaints-2008-2014.pdf.

[5] Since 2009, some states that had already added sexual orientation as a protected category passed legislation adding gender identity, but no state has added sexual orientation in the present decade.

gay marriage.[6] While many factors might explain the abrupt change in momentum, the timing of the case of New Mexico photographer Elaine Huguenin cannot be ignored.

In the waning weeks of 2009—the same year in which Delaware, Maryland, and Nevada became the last three states to extend public accommodations protections to the category of sexual orientation[7]—a New Mexico trial court issued its ruling that Elane Photography had violated the New Mexico Human Rights Act when the family-owned business declined to photograph a same-sex commitment ceremony.[8] The ruling on the hot-button social issue quickly garnered national media attention, which intensified as the case proceeded.

In affirming the ruling in 2013, the New Mexico Supreme Court wrote, "when Elane Photography refused to photograph a same-sex commitment ceremony, it violated the [New Mexico Human Rights Act] in the same way as if it had refused to photograph a wedding between people of different

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[6] For example, polling by the Pew Research Center suggests that, in 2009, 37% of U.S. adults favored same-sex marriage and 54% opposed it; while in 2017, the percentages are reversed, with 62% of U.S. adults favoring it and 32% opposing it. *See* Pew Poll, *Changing Attitudes on Gay Marriage*, Pew Research Center (June 26, 2017), http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/.

[7] 77 Del. Laws 264, 264–65 (2009)*;* 2009 Md. Laws 540, 554; 2009 Nev. Stat. 716, 717.

[8] Elane Photography, LLC v. Willock, CV2008-00632 (N.M. Dist. Ct. Dec. 11, 2009).

races."[9] A concurring opinion, which would trigger much heated commentary, conceded that the result "is little comfort to the Huguenins, who now are compelled by law to compromise the very religious beliefs that inspire their lives. Though the rule of law requires it, the result is sobering. It will no doubt leave a tangible mark on the Huguenins and others of similar views."[10] The concurrence continued, "[t]he Huguenins are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead" but in "the smaller, more focused world of the marketplace, of commerce, of public accommodation," they must pay a "price" and "channel their conduct," what the opinion famously called the "price of citizenship."[11]

Conservative reaction was strong and swift. The Huguenins' counsel, Alliance Defending Freedom, issued a press release: "The idea that free people can be 'compelled by law to compromise the very religious beliefs that inspire their lives' as the 'price of citizenship' is a chilling and unprecedented attack on freedom. Americans are now on notice that the price of doing business is their freedom."[12] Albert Mohler, president of the Southern Baptist

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[9] Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

[10] *Id*. at 79 (Bosson, J., concurring).

[11] *Id*. at 79–80.

[12] Press Release, Alliance Defending Freedom, *NM Supreme Court: Price of Citizenship Is Compromising Your Beliefs* (Aug. 22, 2013), https://www.adflegal.org/detailspages/press-release-details/nm-supreme-court--price-of-citizenship-is-compromising-your-beliefs.

Theological Seminary, characterized the decision thusly: "Since Elane Photography is a business offering services to the public, it cannot operate on the basis of the Huguenins' sincerely held Christian principles. . . . According to [the court], the New Mexico Human Rights Act trumps religious liberty rights when the two come into collision. . . . [The author of the concurring opinion] acknowledges that this decision will compel the Huguenins 'to compromise the very religious beliefs that inspire their lives.' But, he insists, the State of New Mexico will compel them to do just that."[13] Robert Myers, president of a small religious college, responded: "So . . . the courts in New Mexico have said it. How can the State compel us to disobey God? It's the price of citizenship."[14]

Other wedding-related services quickly came under the scrutiny of state courts applying public accommodations statutes, engulfing a wide spectrum of small and family-owned wedding businesses—e.g., custom cake makers,[15] florists,[16] calligraphers[17] and

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[13] R. Albert Mohler, Jr., *"It Is the Price of Citizen-ship"?—An Elegy for Religious Liberty in America*, AlbertMohler.com (Aug. 26, 2013), http://www.albertmohler.com/2013/08/26/it-is-the-price-of-citizenship-an-elegy-for-religious-liberty-in-america/.

[14] Robert M. Myers, *Disobey God? Sure . . . It's the Price of Citizenship*, Huffington Post (Aug. 30, 2013), http://www.huffingtonpost.com/dr-robert-m-myers/disobey-god-sureits-the-p_b_3844620.html.

[15] *See* In the Matter of Melissa and Aaron Klein, 34 BOLI 102 (2015), http://www.oregon.gov/boli/Legal/BOLI_Final_Orders/34_BOLI_Orders.pdf.

[16] *See* Washington v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017).

wedding-venue owners[18]—with each case garnering significant national media attention. Undoubtedly for many Americans, public accommodations laws are now indelibly intertwined with conflicts over such wedding-related services.

Notably, in the eight years since courts first began applying antidiscrimination laws against businesses with religious objections to same-sex nuptials, *no state* has enacted legislation prohibiting sexual orientation discrimination in places of public accommodation. When such legislation has been considered, it has often been opposed as dangerous to freedom of speech and religion, with impassioned warnings of the perils to wedding professionals who conscientiously object to same-sex marriage.[19] The Heritage Foundation, for example, opposes all "sexual orientation and gender identity (SOGI) laws" on the grounds that they "threaten fundamental First Amendment rights," having been "used to penalize bakers, florists, [and] photographers . . .

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[17] *See* Scott Shackford, *Arizona Calligraphers Sue to Keep from Having to Write Gay Wedding Invitations*, Reason (Sept. 21, 2016), http://reason.com/blog/2016/09/21/arizona-calligraphers-sue-to-keep-from-h.

[18] *See* Matter of Gifford v. McCarthy, 137 A.D.3d 30 (2016); AP Staff, *Farmer Blocked at Market Over Gay Marriage Seeks Court Order*, U.S. News & World Report (July 17, 2017), https://www.usnews.com/news/best-states/michigan/articles/2017-07-17/farmer-blocked-at-market-over-gay-marriage-seeks-court-order.

[19] Many of these bills have also been opposed for adding gender identity as a protected category. The issues regarding transgender individuals' use of bathrooms and other facilities is not at issue here.

when they declined to act against their convictions concerning marriage and sexuality."[20]

Not surprisingly, in state legislative committee hearings, the plight of wedding professionals has been front and center. In testimony before the Kansas House Judiciary Committee, an organization called the Faith, Family and Freedom Alliance of Kansas referenced the "well-known examples of Sweet Cakes Bakery in Oregon" and "Christian wedding chapel owners Richard and Betty Odgaard in Iowa" and warned that "SOGI laws and ordinances passed in other states . . . are already being used to penalize and persecute people of faith."[21] In Montana, the Executive Director of the Montana Catholic Conference told the Montana House Judiciary Committee, "While the Roman Catholic Church opposes unjust arbitrary discrimination in all its forms and there are some points in this bill that we could affirm, the bill seemingly does not provide adequate protections for those who might object to celebrating, by their actions, situations that run contrary to their deeply held beliefs."[22]

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[20] Ryan Anderson, *Sexual Orientation and Gender Identity (SOGI) Laws Threaten Freedom*, Heritage Foundation (Nov. 30, 2015), http://www.heritage.org/civil-society/report/sexual-orientation-and-gender-identity-sogi-laws-threaten-freedom.

[21] Michelle Schroeder, *Testimony in Opposition to HB 2323*, Kansas H. Judiciary Comm. (Jan. 14, 2016), http://kslegislature.org/li_2016/b2015_16/committees/ctte_h_jud_1/documents/testimony/20160114_40.pd.

[22] Matthew Brower, *Testimony in Opposition to HB 417*, Montana H. Judiciary Comm. (Feb. 15, 2017), http://leg.mt.gov/bills/2017/Minutes/House/Exhibits/juh33a16.pdf.

After attempts for nine years to have a bill heard in Idaho, a committee in the Idaho House heard 21 hours of public testimony spread out over three days, during which "gay and trans people told stories of discrimination, harassment, and violence in Idaho."[23] According to one press account, Republican Representative Linden Bateman was visibly moved, promising to those present, "I know from this point on—forever—I will be kinder and I will be more compassionate to those who bear a heavy burden."[24] Nevertheless, Bateman and fellow Republicans voted down the bill 13–4. "Republicans worried," reported the press, "that in trying to outlaw discrimination, the bill would force religious-minded florists, bakers, photographers and others to violate their convictions about homosexuality or face lawsuits for refusing gay customers."[25]

While there may be many factors affecting the reticence of twenty-nine states to include sexual orientation in their public accommodations laws, there can be little doubt that a significant factor—perhaps the most significant—is the use of such laws in some states to penalize wedding professionals who conscientiously object to same-sex marriage.

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[23] Jessica Robinson, *Idaho Gay Rights Bill Dies in Tearful Committee Hearing*, Nw. News Network (Jan. 29, 2015), http://nwnewsnetwork.org/post/idaho-gay-rights-bill-dies-tearful-committee-hearing.

[24] *Id.*

[25] *Id.*

II. The Current Political Stalemate Presents Polarized Extremes: People of Faith in "Blue" States Cannot Conscientiously Object to Rendering their Services in Celebration of Same-Sex Marriage, While LGBT People in "Red" States Can Be Ejected from Businesses for Being Gay.

The twenty-one states that recognize sexual orientation in their public accommodations laws are, in general, "blue" states with Democratic majorities. All of these jurisdictions added sexual orientation to their public accommodations statutes prior to the adoption of same-sex marriage, and none of them expressly protected conscientious objectors to same-sex marriage. Further, in the years since courts first began applying public accommodations laws against wedding professionals who conscientiously objected to servicing same-sex weddings, none of these states passed legislation to accommodate such objections. The prevailing attitude in these state governments appears to be summarized by the sentiment that any such accommodation would countenance "religion . . . being used . . . to deny others equality."[26]

In these states, the consequences for wedding professionals who voice their objection to same-sex marriage and decline to service such weddings can,

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[26] U.S. Comm'n on Civil Rights, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties* (Sept. 2016), http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF (statement of Chairman Martin R. Castro) ("However, today, as in the past, religion is being used as both a weapon and a shield by those seeking to deny others equality.").

in some cases, be severe. In Oregon, the Bureau of Labor and Industries ordered bakers Melissa and Aaron Klein to pay $135,000, "representing compensatory damages for [the lesbian couple's] emotional, mental and physical suffering."[27] The administrative decision justified the large award based on comparisons to cases of extreme sexual and racial harassment.[28] In neighboring Washington, florist Baronelle Stutzman was held personally liable for the extensive attorney's fees that the

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[27] In the Matter of Melissa and Aaron Klein, 34 BOLI 102 (2015), http://www.oregon.gov/boli/Legal/BOLI_Final_Orders/34_BOLI_Orders.pdf.

[28] *Id.* at 129 n.20 (citing cases with purportedly "consistent" awards). In one allegedly comparable case awarding $100,000 and $50,000 respectively, two Hispanic employees were targeted by coworkers and subjected to constant racial epithets, threats with firearms, physical assault (punches to the face and abuse with a wooden bat), and retaliation for their eventual cooperation with law enforcement. In the Matter of Maltby Biocontrol, Inc., 33 BOLI 121 (2014). In another case awarding $125,000, a male employer repeatedly sexually harassed a female subordinate with both verbal and physical overtures. After she rebuffed him, he retaliated by firing her; telling a local newspaper she was a "meth addict" and illegal drug smuggler; instigating a criminal investigation that accused her of burglary and vandalism; and publishing articles online purporting to prove her sexual promiscuity and questioning the paternity of her child. In the Matter of From the Wilderness, Inc., 30 BOLI 227 (2009). In yet another case awarding $50,000, an employer in his late fifties subjected a twenty-one-year-old female employee to repeated sexual innuendo, instructed her to wear revealing attire and to expose herself to customers, demanded "full frontal" hugs, and twice hit her on the head with his fist. In re Matter of Charles Edward Minor, 31 BOLI 88 (2010).

American Civil Liberties Union (ACLU) accumulated during the parties' four-year legal battle.[29]

Faced by such legal repercussions, conscientious objectors are increasingly caught between a rock and a hard place. If they decline service or otherwise make their views known,[30] they risk business-ending penalties and personal liability. If they agree instead to render their services for the celebration of same-sex nuptials, they must suppress their personal, religious views and show feigned support, lest they disappoint their paying customers with the knowledge that the person responsible for a ceremonially significant detail of the wedding

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[29] *See* Washington v. Arlene's Flowers, Inc., 389 P.3d 543, 567–68 (Wash. 2017).

[30] The New Mexico Supreme Court has suggested that a business owner could lawfully "post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable anti-discrimination laws." Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014). But this suggestion seems to ignore the applicability of hostile environment law to public accommodations. *See* Andrew Koppelman, *A Free Speech Response to the Gay Rights/ Religious Liberty Conflict*, 110 Nw. U. Law Rev 1125 (2016). For example, in Illinois and other states, it is unlawful to "publish, circulate, [or] display" any communication "which the operator knows is to the effect that any of the facilities of the place of public accommodation will be denied to any person or that any person is unwelcome, objectionable or unacceptable because of unlawful discrimination." 775 Ill. Comp. Stat. 5/5-102 (2014). Such laws have become the basis for discrimination complaints against opponents of same-sex marriage. *See* Koppelman at 1126–27, 1141–44. Even worse, such signs "may function as a magnet," drawing protestors "eager to punish those whose views they find odious." *Id.* at 1139.

actually harbors religious objections to it.[31] Thus, conscientious objectors in these "blue" states are forced to weigh the power of the state over their business against the burden of the closet over their conscience.

In stark contrast, most "red" states with Republican majorities do not prohibit *any form* of sexual orientation discrimination. In the twenty-nine states without safeguards against LGBT discrimination in places of public accommodation, Republican majorities presently control both houses of the state legislature.[32] The prevailing attitude in these state governments appears to be summarized by the sentiment that "SOGI laws" (i.e., sexual orientation and gender identity bills) "pose [a serious threat] to fundamental freedoms guaranteed to every person" and therefore should be "rejected" "at the federal, state, and local levels."[33]

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[31] For example, when a lesbian couple in Canada discovered that the jeweler they commissioned for their engagement rings had posted a sign against same-sex marriage, the couple felt the rings, which "were meant to be a symbol of love," had become "tainted" and demanded a refund. CBC News Staff, *Jewelry Store Sign Prompts Same-Sex Couple to Ask for Refund*, CBC Radio-Canada (May 17, 2015), http://www.cbc.ca/news/canada/newfoundland-labrador/jewelry-store-sign-prompts-same-sex-couple-to-ask-for-refund-1.3077192.

[32] *See, e.g.*, Nat'l Conf. of State Legislatures, *State Partisan Composition* (Aug. 1, 2017), http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx.

[33] *Preserve Freedom, Reject Coercion*, BreakPoint.org (Dec. 14, 2016), http://breakpoint.org/freedom ("SOGI laws in all these forms, at the federal, state, and local levels, should be rejected. We join together in signing this letter because of the serious threat that SOGI laws pose to fundamental freedoms guaranteed to every person.").

While this rejection of public accommodations bills appears to be rooted in the fear that such laws will be used to persecute conscientious objectors to same-sex marriage, the result—refusing to consider any law whatsoever—leaves many LGBT bereft of significant protections in the numerous instances in which religious liberty is not at issue.

Many allegations of discrimination on the basis of sexual orientation do not raise First Amendment concerns. Over the four decades since the District of Colombia first extended antidiscrimination laws to sexual orientation, only a relatively small number of cases have raised First Amendment defenses to the application of antidiscrimination statutes. By way of example, in Colorado between 2008 and 2014, there were 56 public accommodations complaints on the basis of sexual orientation and gender identity filed with state enforcement agencies.[34] But only one of these cases—Petitioners'—appears to have raised a credible First Amendment defense.

Regrettably, the twenty-nine states without laws to protect LGBT in places of public accommodation leave LGBT exposed to potential abuses that most Americans would find deplorable.[35] Thus, in Texas, a

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[34] *See* Christy Mallory & Brad Sears, *Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008–2014*, Williams Inst. (Feb. 2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Accommodations-Discrimination-Complaints-2008-2014.pdf.

[35] In addition to public accommodations, most of these twenty-nine states (Utah is the exception) also do not protect LGBT

waitress can, with impunity, tell a gay couple not to return with the explanation, "we don't serve f--s here."[36] An Indiana restaurateur can lie to his would-be LGBT patrons that the equipment in his restaurant is broken even though it isn't and other customers are already eating at their tables.[37] And in Tennessee, LGBT people can be made to endure the indignity of a "No Gays Allowed" sign hanging in the window of a local hardware store.[38]

The contrast between blue and red states, thus, is striking. In blue states, a baker who hires LGBT employees and regularly serves LGBT customers, but who declines to use his talents in the service of celebrating same-sex weddings, can be driven out of business by the State, while in red states a baker can drive away would-be patrons for being gay without consequence. These extreme and divergent results are inconsistent with public opinion.

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from discrimination in housing or employment. *See* http://www.lgbtmap.org/equality-maps/non_discrimination_laws.

[36] *See* KRLD Staff, *Gay Couple Told Not to Return to East Texas Restaurant*, CBS Local Media (May 29, 2014), http://dfw.cbslocal.com/2014/05/29/gay-couple-told-not-to-return-to-east-texas-restaurant/.

[37] *See* Khushbu Shah, Indiana *Restaurateur Admits He's Always Discriminated Against LGBT Diners*, Eater.com (Mar. 30, 2015), https://www.eater.com/2015/3/30/8313959/indiana-restaurateur-discriminate-against-lgbt-gay-lesbian-rights.

[38] *See* WBIR Staff, *Tennessee Hardware Store Puts Up "No Gays Allowed" Sign*, USA Today (July 1, 2015), http://www.usatoday.com/story/news/nation-now/2015/07/01/tennessee-hardware-store-no-gays-allowed-sign/29552615/.

III. Although State Laws Reflect an Extreme Divide, a Majority of Americans Have Identified a Reasonable Compromise.

A sizeable majority of Americans agree that gays and lesbians should not be denied service on the basis of their sexual orientation, and a similar majority agree that wedding-related professionals should not be compelled to service same-sex wedding ceremonies. When analyzed carefully, public polling demonstrates that most Americans distinguish between, on the one hand, denying services to gays and lesbians on the basis of their sexual orientation and, on the other hand, declining for religious reasons to provide certain wedding-related services for same-sex nuptials. A strong majority disapproves of the former, but approves of the latter.

Recent polling data clarify this distinction. A March 10, 2017 report by the Public Religion Research Institute concludes there is broad support for laws protecting LGBT against discrimination in jobs, public accommodation, and housing, with seven in ten (70%) Americans in favor of such laws, and roughly one-quarter (26%) opposed. The same report concludes that 64% of Americans oppose allowing small business owners to refuse to provide products or services to gay or lesbian people. Poll participants were asked: "Do you favor or oppose allowing a small business owner in your state to refuse to provide products or services to gay or lesbian people, if doing so violates their religious beliefs?" Notably, the question evaluated the prospect of a general denial of service to gay or lesbian "people" by any small business owner regardless of the nature of goods or

services provided. Only 32% favored such a policy, with twice as many (64%) opposing it.[39]

In contrast, a June 28, 2017 poll by Rasmussen Reports showed public opinion reversed when asked specifically to consider wedding-related service providers like Petitioners. This poll asked, "Should it be legal for a baker to refuse for religious reasons to make a wedding cake for a gay couple, or should that baker be prosecuted for discrimination for refusing to make the wedding cake?" Under these more specific circumstances, 57% of Americans agreed the baker should be free to decline to make the same-sex wedding cake and only 29% believed the baker was unlawfully discriminating, with 14% undecided.[40] The results suggest that a majority of Americans distinguish between blanket denials of service to LGBT *people* and specific refusals to provide services in celebration of same-sex *weddings*.

This same result can be observed in 2015 polling by the Associated Press (AP-GfK polling) in the wake of this Court's decision in *Obergefell*. That poll asked half of the sample population two related but distinct questions. The question for the first group was, "Do you think that wedding-related businesses

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[39] *See* Daniel Cox & Robert P. Jones, *Religious Liberty Issues*, Pub. Religion Research Inst. (Mar. 10, 2017), https://www.prri.org/research/lgbt-transgender-bathroom-discrimination-religious-liberty/.

[40] *See* Rasmussen Poll, *Most Uphold Baker's Right to Refuse Gay Wedding Cake*, Rasmussen Reports (June 28, 2017), http://www.rasmussenreports.com/public_content/politics/current_events/social_issues/most_uphold_baker_s_right_to_refuse_gay_wedding_cake.

with religious objections should be allowed to refuse service to same-sex couples, or not?" Similar to the recent Rasmussen Reports poll, 59% of the respondents answered, "Yes, they should be allowed to refuse service." Only 39% answered, "No, they should not be allowed to refuse service." The second group was asked an almost identical question, except the qualifier "wedding-related" was omitted: "Do you think that businesses with religious objections should be allowed to refuse service to same-sex couples, or not?" To this slightly different question, only 46% answered, "Yes, they should be allowed to refuse service," while 51% responded, "No, they should not be allowed to refuse service."[41]

Thus, the public clearly distinguishes between, for example, refusing to sell gays and lesbians baked goods and declining to make custom cakes for same-sex weddings. The public appears to conclude that the former is an unlawful discrimination based on sexual orientation while the latter is a permissible exercise of conscience.

As former Solicitor General Ted Olson recognized after *Obergefell*, there's a "differen[ce]" between "walk[ing] into a bakery on the street and want[ing] to buy a pie or a doughnut or something like that" and "being asked to participate in a wedding, to perform a wedding, to sing in a wedding, to participate and be a wedding planner, something

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[41] *See* AP-GfK Poll, *A survey of the American general population (ages 18+)*, GfK Public Affairs & Corp. Commc'ns (July 2015), http://ap-gfkpoll.com/main/wp-content/uploads/2015/07/AP-GfK_Poll_July_2015-Topline_gay-marriage.pdf.

like that."[42] Yale Law Professor William Eskridge, Jr., made a similar observation to the New Yorker: "Fundamentalist Protestants, Catholics, Orthodox Jews, Muslims, Mormons—it's a big chunk of America. Decent people. . . . Many have no problem with gay customers. They just don't want to participate in the choreography of gay weddings."[43]

Despite the public recognition, no jurisdiction distinguishes between flatly refusing to sell any cakes to gay patrons on the one hand and declining to custom design same-sex wedding cakes on the other. States either prohibit or permit both.

IV. Recognizing the First Amendment Rights of Conscientious Objectors to Same-Sex Marriage Would Help End the Political Stalemate over Public Accommodations.

Our federalist system reveals its "theory and utility" when the States "perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).[44] Regrettably, this vital

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[42] Melanie Hunter, *Ted Olson: "Not Illegal" for Bakery to Refuse to Take Part in Gay Wedding Under SCOTUS Ruling*, CNS News (June 29, 2015), http://www.cnsnews.com/news/article/melanie-hunter/ted-olson-not-illegal-bakery-refuse-take-part-gay-wedding-under-scotus.

[43] Roger Parloff, *Christian Bakers, Gay Weddings, and a Question for the Supreme Court*, New Yorker (Mar. 6, 2017), http://www.newyorker.com/news/news-desk/christian-bakers-gay-weddings-and-a-question-for-the-supreme-court.

[44] *See also* Oregon v. Ice, 555 U.S. 160, 171 (2009) ("We have long recognized the role of the States as laboratories for

democratic experimentation has been largely elusive in the clash between public accommodations laws and the rights of conscientious objectors to same-sex marriage. Far from being fertile ground for "innovation and experimentation," Bond v. United States, 564 U.S. 211, 221 (2011), the States are very sharply divided into polarized extremes, the result of "legal and political trench warfare."[45] That this hardened divide signals a breakdown in the role of the States as laboratories for experimentation is underscored by the contrary consensus in popular opinion favoring compromise—that is, prohibiting gays and lesbians from being denied services in places of public accommodation, while nevertheless allowing objections to servicing same-sex weddings on the basis of conscience.

To bridge the current political impasse, First Amendment rights must first be recognized. Both blue states and red states have, generally speaking, adopted "zero tolerance" policies toward public accommodations laws. Blue states demonstrate zero tolerance for conscientious objectors because, they fear, "even a narrow 'license to discriminate' [would be] seen as eviscerating the whole principle of

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devising solutions to difficult legal problems."); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[45] Jonathan Rauch, *Gay Rights, Religious Liberty, and Nondiscrimination: Can a Train Wreck Be Avoided?*, 2017 U. Ill. Law Rev 1195, 1196, https://illinoislawreview.org/print/vol-2017-no-3/gay-rights-religious-liberty-and-nondiscrimination/.

nondiscrimination."[46] And red states, fearing the lack of protections for these conscientious objectors, have zero tolerance for any public accommodations laws that might be used against religious objectors. But if the First Amendment protects the rights of wedding professionals such as Petitioners, both sides may be persuaded to retreat from their present extremes. Blue states could accommodate the First Amendment rights of religious believers without fear of licensing discrimination against LGBT people, and red states could pass antidiscrimination legislation for LGBT people without fear of exposing religious believers to punishment.[47]

Alternatively, if the First Amendment does not protect Petitioners, the current stalemate will likely persist. When the sponsor of a Pennsylvania bill that would have added sexual orientation to the state's antidiscrimination laws argued that religious freedom would still be protected under the First Amendment, an advocacy group opposed to the bill asked rhetorically: "Was the First Amendment present when florist Barronelle Stutzman was sued for declining to be a part of a same-sex wedding ceremony in Washington State and now faces over $1 million in fines and attorney fees? Or cake baker Melissa Klein in Oregon when she was fined $135,000? Or photographer Elaine Huguenin when she was fined close to $6,000? For each of these fines, the charges point directly to their state law

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[46] *Id.* at 1203.

[47] *Id.* at 1206 ("I would remind my LGBT friends that even a fairly wide range or exemptions would offer much more protection than the *status quo*, in which many places offer zero protection.").

that had placed the special status of 'sexual orientation' and 'gender identity' into public accommodation law—which is exactly what [Pennsylvania's] HB1510 and SB974 would do."[48] The bill was defeated.

While seemingly counterintuitive, a decision in favor of Petitioners can be a win-win for both LGBT protections and religious liberties. When assured that antidiscrimination legislation would not be used to infringe the rights of free speech, association, and religion, a supermajority of Republican legislators in Utah were persuaded to add sexual orientation to the state's housing and employment discrimination laws.[49] Front and center during Utah's legislative debate was the case of a Salt Lake City police officer who requested to be reassigned from performing motorcycle stunts in Salt Lake City's gay pride parade. Sponsors of Utah's compromise legislation assured conservative lawmakers that their bill would protect employees like the officer from being coerced into expressing support for same-sex marriage.[50] Affording protection to conscientious

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[48] Pennsylvania Family Council, *Representative Frankel: You're Wrong About HB1510* (May 25, 2016), https://pafamily.org/2016/05/frankel/.

[49] The historic legislation passed Utah's Senate by a vote of 23 to 5 and the House by 65 to 10. (75% of Senate Republicans and 84% of House Republicans voted in favor.) Lindsey Bever, *Utah—yes, Utah—passes landmark LGBT rights bill*, Wash. Post (Mar. 12, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/03/12/Utah-legislature-passes-landmark-lgbt-anti-discrimination-bill-backed-by-mormon-church/.

[50] *See* Sen. Stephen Urquhart, *Comments in Support of SB 296*, Utah Senate Floor Debate (Mar. 6, 2015), https://le.utah.gov/~2015/bills/static/SB0296.html.

objectors paved the way for Utah's LGBT community to achieve what otherwise might have been impossible—broad protections for LGBT people in Utah's housing and employment laws. Yet without similar assurances that wedding professionals in Utah would not be punished for declining to service same-sex weddings, Utah's lawmakers have not extended the same LGBT protections in state public accommodations laws.

If this Court rules against Petitioners, there is little reason to believe the almost decade-long impasse will change anytime soon. But if this Court concludes instead that the First Amendment allows Petitioners to decline to service same-sex weddings—thereby removing one of the principal reasons for opposing public accommodations laws—lawmakers in red states like Utah may be open to adding sexual orientation to their antidiscrimination laws. Thus, by recognizing Petitioners' First Amendment right to conscientiously object to the celebration of same-sex marriage, millions of LGBT people may ultimately receive the protections of antidiscrimination laws.

CONCLUSION

As with other "reasonable and sincere people here and throughout the world," Petitioner Jack Phillips believes marriage "is by its nature a gender-differentiated union of man and woman." Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015). And as recognized by this Court, "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises." *Id.* at 2602.

Protected by the First Amendment, Phillips may "advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Id.* at 2607. And if "[t]he First Amendment ensures that" Phillips is "given proper protection" to teach affirmatively "the principles that are so fulfilling and so central to [his] li[fe] and faith[]," *id.*, then it also ensures that he cannot be compelled by the State to violate those principles in celebrating a wedding contrary to his faith, at the risk of losing his livelihood otherwise.

Significantly, should this Court recognize Phillips' First Amendment right not to celebrate same-sex weddings, twenty-nine states may be more amenable to passing protections for millions of LGBT people "against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." Romer v. Evans, 517 U.S. 620, 631 (1996).

For the foregoing reasons, *amici* respectfully request that the Court reverse.

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APPENDIX

Appendix A

Members of the Utah Senate Republican Caucus
(22 of 24)

Wayne L. Niederhauser (Utah Senate President)
Ralph Okerlund (Majority Leader)
J. Stuart Adams (Majority Whip)
Peter C. Knudson (Assistant Majority Whip)
Jacob L. Anderegg
Curtis S. Bramble
David G. Buxton
Allen M. Christensen
Margaret Dayton
Lincoln Fillmore
Wayne A. Harper
Daniel Hemmert
Deidre M. Henderson
David P. Hinkins
Don L. Ipson
Brian E. Shiozawa
Howard A. Stephenson
Jerry W. Stevenson
Kevin Van Tassell
Daniel W. Thatcher
Evan J. Vickers
Todd Weiler